

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

ELECTRICITY MAINE, LLC

Docket No. 2010-00256

**Re: Application for License to Operate
As a Competitive Electricity Provider
Pertaining to Electricity Maine, LLC**

**BRIEF OF THE OFFICE
OF THE
PUBLIC ADVOCATE**

August 30, 2019

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I. Introduction

The Office of the Public Advocate (OPA) offers this Brief following the hearing and closing of the record in the proceeding commenced with the Commission's July 24, 2018 Order to Show Cause. In this Brief, we seek action by the Commission to suspend for one year the license to operate as a competitive electricity provider (CEP) held by Electricity Maine, LLC (Electricity Maine or the company) and we argue that while the evidence allows the Commission to impose upon the company a maximum monetary penalty of \$5 million (or less, depending on the annual gross revenues of Electricity Maine) associated with identified violations of Maine Statute and Commission rules, we urge the Commission to assess a penalty of no less than \$1 million.

II. Applicable Law

Title 35-A M.R.S.A. §3203(4-A) provides in part:

As a condition of licensing, a competitive electricity provider:

- A. Shall obtain a consumer's authorization before serving the consumer;
- B. Must comply with the provisions of the Maine Unfair Trade Practices Act, Title 5, chapter 10;
*** [and]
- H. Must comply with any other applicable standards or requirements established by the commission by rule.

Title 5 M.R.S.A. §207, included in the Maine Unfair Trade Practices Act, Title 5, chapter 10, provides in part: “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful.”

Title 35-A M.R.S.A. §3203(5) provides in part that the Commission “may conduct proceedings for the revocation of a license when a requirement of this section has not been complied with by a competitive electricity provider.”

Title 35-A M.R.S.A. §1508-A(1) provides in part:

1. Penalty. Unless otherwise specified in law, the commission may, in an adjudicatory proceeding, impose an administrative penalty as specified in this section.

A. For willful violations of this Title, a commission rule or a commission order by ... a competitive electricity provider, the commission may impose an administrative penalty for each violation in an amount that does not exceed \$5,000 or .25% of the annual gross revenue that ... the competitive electricity provider received from sales in the State, whichever amount is lower. Each day a violation continues constitutes a separate offense. The maximum administrative penalty for any related series of violations may not exceed \$500,000 or 5% of the annual gross revenue that ... the competitive electricity provider received from sales in the State, whichever amount is lower.

B. For a violation in which ... a competitive electricity provider was explicitly notified by the commission that it was not in compliance with the requirements of this Title, a commission rule or a commission order and that failure to comply could result in the imposition of administrative penalties, the commission may impose an administrative penalty that does not exceed \$500,000.

Maine courts have found willful acts to include “conduct on the part of the defendant which displays an utter and complete indifference to and disregard for the rights of others. One should not be permitted to hide behind his lack of knowledge if he has meticulously avoided every means of acquainting himself with the truth.” *Blaisdell v. Daigle*, 149 A.2d 904, 155 Me. 1 (1959).

In cases where a person or corporation uses an independent contractor to perform work tasks, it is the general rule that the person or corporation has no liability in tort for the

negligence of the independent contractor. *Legassie v. Bangor Publishing Co.*, 1999 ME 180 at ¶5, 741 A. 2d 442, 444 (Me. 1999), citing *Bonk v. McPherson*, 605 A.2d 74, 78 (Me.1992).

However, again for purposes of liability in tort, an independent contractor may be considered an employee under certain circumstances. The most important factor in determining whether an individual is an employee, or an independent contractor is control. *Legassie* at ¶6, citing *Timberlake v. Frigon & Frigon*, 438 A.2d 1294, 1296 (Me.1982).

Here, because Electricity Maine contracted with third party vendors to supply sales agents for its marketing campaign, some provisions of these precedents apply. Even if an independent contractor relationship is demonstrated, the person or company engaging an independent contractor may be liable under the theory of negligent hiring. Maine recognized the tort of negligent hiring in *Dexter v. Town of Norway*, 1998 ME 195, 715 A. 2d 169. In that decision the court adopted Restatement (Second) of Torts § 411, *Id.* at ¶10, which provides that “[a]n employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons.”

III. Burden of Proof

Orders to Show Cause are not addressed in the Maine Rules of Civil Procedure, the Administrative Procedures Act, Title 35-A or Chapter 110 of the Commission’s Rules.

Rather, the procedure is intrinsic to a tribunal’s power to impose sanctions for contempt. *See*,

e.g., *Mitchell v. Flynn*, 478 A.2d 1133 (Me. 1984). The Commission possesses this power pursuant to 35-A M.R.S.A. §1502, which provides:

Every public utility or person that fails to comply with an order, decision, rule, direction, demand or requirement of the commission or of a commissioner is in contempt of the commission and shall be punished by the commission for contempt in the same manner as contempt is punished by courts of record. Punishment for contempt is not a bar to and does not affect any other remedy prescribed in this Title; but is cumulative and in addition to other remedies.

A motion for a show cause order must make a *prima facie* case that the alleged contemnor is in contempt of a legal obligation. *Mitchell, supra*, at 1135. Once such a *prima facie* demonstration has been made, the alleged contemnor assumes the burden of production to disprove or raise affirmative defenses to the allegations of contempt. *Id.* The Commission's July 24, 2019 Order to Show Cause in this matter implicitly found that a *prima facie* case for contempt had been demonstrated based on repeated complaints, Electricity Maine's failure to deny the complaints, and its failure to adequately address recurring violations.

The burden of proof is not generally changed by the initial demonstration of a *prima facie* case. *Mitchell, supra*, at 1135. When initiated by a judicial official's entry of a show cause order based on a finding of probable cause, however, the alleged contemnor assumes the burden of proof to demonstrate that it was not in willful contempt of the court's prior order. *Trivette v. Trivette*, 162 N.C. App. 55, 60, 590 S.E.2d 298, 303 (2004). This is consistent with 35-A M.R.S.A. §1314, which provides that in all trials, actions and proceedings arising under Title 35-A or growing out of the exercise of the authority granted to the Commission, the burden of proof is on the party adverse to the Commission.

IV. Procedural History

On January 22, 2018, the Commission issued a Request for Information to Electricity Maine regarding a number of customer complaints made about Electricity Maine's door-to-door sales practices. Electricity Maine provided a response to the Request for Information on February 9, 2018. On March 5, 2019, the Commission's General Counsel issued a letter to Electricity Maine acknowledging receipt of the response and informing Electricity Maine that "the complaints that have been received are extremely serious and if such activity continues in the future, the MPUC Staff will ask the Commission to initiate a proceeding to consider specific sanctions, including license suspension, license revocation and/or monetary fines."

On May 1, 2018, the Commission issued a second Request for Information to Electricity Maine related to additional complaints received regarding Electricity Maine's door-to-door sales practices. Electricity Maine provided an initial response to the second Request for Information on May 11, 2018, with a further response that included information for which a protective order was granted on May 14, 2018.

On June 8, 2018, the Commission issued a second Request for Information related to door-to-door marketing efforts conducted in Fryeburg, Maine from May 12 to June 7, 2018. Electricity Maine provided an initial response to the Request for Comments on June 18, 2018 and follow up confidential response on June 21, 2018.

On July 24, 2018, the Commission issued an Order to Show Cause that, based on the repeated complaints, failure to deny, and failure to address adequately the recurring

violations, directed Electricity Maine “to show cause why its marketing practices should not be found to have violated Maine statutes and Commission rules regarding its operations as a licensed CEP in Maine.” Electricity Maine provided an initial response to the Order to Show Cause on August 13, 2019 and a follow up confidential response on August 14, 2018.

On February 6, 2019, the Commissioner an Order Scheduling Case Conference and Providing Opportunity for Intervention. In response, the Office of the Public Advocate intervened on February 7, 2019. No other parties intervened. An initial case conference was held on February 22, 2019.

On May 10, 2019, the Examiners filed a customer complaint record (Complaint Record). *Attachment to July 19, 2019 Procedural Order (record & post-hearing process) CMS items 47 (redacted) and 48 (confidential)*. The Complaint Record consists of seventy-four (74) separate complaints received by the Commission that pertain to Electricity Maine’s door-to-door sales campaign.¹

On May 23, 2019, Electricity Maine filed the Direct Testimony of Kira Jordan. Data requests were issued by the OPA on May 29, 2019 and by the Commission Staff on May 30, 2019. Responses were filed on June 10, 2019. A technical conference was held on June 18, 2019.

A Hearing was held on July 17, 2019. The proceeding has now moved to the briefing stage.

¹ This number was derived from Electricity Maine’s response to ODR-002-001.

V. The nature and extent of the violations of Maine law perpetrated by Electricity Maine during its door-to-door marketing campaign warrant a license suspension and a significant monetary penalty.

Through its sales agents, Electricity Maine engaged in a door-to-door (D2D) marketing campaign in Central Maine Power Company's (CMP) in late 2018 through mid-2018. This campaign resulted in significant fraudulent and deceptive activity on the part of some of these agents, often resulting in customers becoming enrolled as Electricity Maine customers against their will. Electricity Maine has failed to provide any evidence in this case, either in 1) filings responsive to Commission letters and other communications, 2) the May 23, 2019 Direct Testimony of Kira Jordan or 3) at hearing in response to questions from the OPA, the Staff or the Commissioners, that the allegations made against the company in the Complaint Record were not the result of the willful behavior of its sales agents, or that the events complained of did not occur as described. Rather Electricity Maine did not attempt to refute or deny any of the facts contained in these complaints. Electricity Maine has failed to discharge its burden of proof that through the activities complained of Electricity Maine is not in violation of Maine laws, statutes or Commission rules.

The factual scenarios described in the Complaint Record and briefed below are very serious, often egregious violations of the applicable statutes and rules. In many places the behavior of Electricity Maine's sales agents was callous and despicable, particularly in targeting elderly individuals. This behavior warrants aggressive enforcement by the Commission to deter further violations by this CEP and also so that other CEPs licensed to operate in Maine's retail electricity market understand that such behavior will not be tolerated.

These agents were clearly under the control of Electricity Maine. They were required to go through training specific to Maine and its law and regulations (see *Jordan Direct at 4-9*). When complaints came in it was Electricity Maine (and not the third-party contractor that directly employed the agents) that responded, either by providing information to CMP or the Commission. It was Electricity Maine that investigated the complaints. *Id. at 9-10*. It was Electricity Maine that conducted further training (*Id. at 10*), and it was Electricity Maine that removed or directed the removal of particular agents from the sales campaign. *Id.* These actions of control satisfy the control standard for liability in *Legassie, supra*.

Moreover, under *Blaisdell*, the outrageous fraudulent and deceptive behavior of the agents described in the Complaint Record and briefed herein does not allow Electricity Maine to credibly argue (and it has not so argued, yet) that it is not responsible for their actions.

Further, Electricity Maine's response to increasingly serious communications and demands from the Commission leading up to the Order to Show Cause were dilatory, ineffective and do not show that the company took the issues seriously. The activities and the complaints continued for months until it terminated the campaign. Electricity Maine is good at saying that it takes these matters seriously, but its actions have not matched this rhetoric.

Of particular note is the Commission General Counsel's March 5, 2018 letter to Electricity Maine in which Electricity Maine is explicitly put on notice that if such activities persisted, he would recommend that the Commission take action to revoke or suspend

Electricity Maine's license and possibly seek monetary fines.² Electricity Maine did not treat this letter seriously. After this date, as we show below, Electricity Maine's sales agents continued their fraudulent and deceptive tactics in the door-to-door marketing campaign. Because it contained an explicit warning, all fraudulent and deceptive sales activity that occurred following Electricity Maine's receipt of this letter were thus subject to the provisions of §1508-A(1)(B).

We urge the Commission to suspend Electricity Maine's license for a minimum of one year. The nature and extent of the violations warrant such a suspension. Electricity Maine's response to these violations has been too little too late and customers have needlessly suffered the stress and aggravation of being mistreated by this company. More importantly, we suspect there are many Maine citizens who have been fraudulently and deceptively enrolled as Electricity Maine customers who do not realize it or who have not complained. For example, Electricity Maine identified six agents who were associated with the first complaint (Bath complaint; Complaint Record pp. 4-12) described below. Each was deactivated. ODR-002-001.

The Commission should also impose monetary penalties on Electricity Maine pursuant to §1508-A. Under §1508(1)(A), the "maximum administrative penalty for any related series of violations may not exceed \$500,000 or 5% of the annual gross revenue" of

² Electricity Maine acknowledged this letter and its contents in its August 13, 2018 response to the Order to Show Cause. *Response of Electricity Maine, LLC to Show Cause Order and Conditional Request for Hearing, August 13, 2018, (CMS Item # 38) ("EM Response to Show Cause Order")*, p. 6.

the company. We believe the evidence described below supports a Commission order that would impose the maximum penalty.³

Section 1508-A(2) provides guidelines for the Commission to follow when considering the size of a monetary penalty. Under the facts of this proceeding, these guidelines support imposition of a maximum penalty. Subsection 2(A) requires the Commission to consider the “severity of the violation, including the intent of the violator and the nature, circumstances, extent and gravity of the prohibited act.” The facts presented in the proceeding, unrebutted by Electricity Maine, show very severe acts of fraud and deception on the part of many of Electricity Maine’s D2D sales agents; the acts were willful and calculated to induce people to sign up for Electricity Maine’s retail products, thus directly benefitting the company. Electricity Maine obviously failed to provide effective training or oversight of these agents and its response once complaints came in was far too little and way too late. Electricity Maine showed a callous disregard for the consumer protection rules contained in Title 35-A and the Commission’s rules.

Subsection 2(B) requires the Commission to consider the “reasonableness of the violator's belief that the violator's action or lack of action was in conformance with this Title, a commission rule or a commission order.” There is no evidence that Electricity Maine believes that its actions did not violate the statutes or rules.

³ While the Order to Show Cause discusses suspension of Electricity Maine’s license, it also explicitly “directs Electricity Maine to show cause why its marketing practices should not be found to have violated Maine statutes and Commission rules regarding its operations as licensed CEP in Maine.” This language did not limit the Commission’s sanction to suspension, but effectively put Electricity Maine on notice that this proceeding involved all of Maine’s CEP licensing statutes and rules.

Subsection 2(C) requires the Commission to consider the history of previous violations. As the Order to Show Cause details, Electricity Maine has been required to respond to many complaints over the years, and to change some of its practices. *Order to Show Cause at 2*. While these events did not result in formal enforcement proceedings, they nevertheless represent a history of violations by the company.

Subsection 2(D) requires the Commission to consider an “amount necessary to deter future violations.” This is an important provision. Enforcement of consumer protections for an essential commodity like electricity is crucially important. The retail market has various problems not the least of which are 1) that customers continue to believe that the utility supplies power, and 2) that customers sign up for or elect to stay with CEPs whose products are substantially more expensive than the standard offer. If this retail market is to mature into one that actually serves the best interests of customers, violations of all kinds, and particularly egregious violations like those present in this record, must be deterred. Deterrence does not apply only to violators, either. While a substantial monetary penalty can get the attention of Electricity Maine like no other action, it is equally important for other CEPs operating or considering opening operations in Maine to see that the licensing authority is willing to aggressively enforce the law when it finds substantial and serious violations thereof.

Finally, subsection 2(E) requires the Commission to consider the “violator’s good faith attempts to comply after notification of a violation.” As this Brief shows, Electricity Maine virtually ignored the General Counsel’s March 5, 2018 warning letter.

In sum, all of the items to be considered by the Commission when weighing the amount of the monetary penalty would support the maximum penalty allowed.⁴

In order to determine a maximum level of monetary penalty that may be assessed, the Commission will need to determine the meaning of the phrase “related series of violations” which applies to the penalty cap in §1508-A(1)(A). Electricity Maine’s D2D campaign spanned many months, running from November 2017 through July 2018, a period of at least eight months. The activities involved a large sales force that operated throughout CMP’s territory. Electricity Maine’s response to ODR-002-001 reveals no fewer than nineteen different sales agents who were deactivated from the campaign, presumably for misbehavior. The Commission can assume that there were many agents who did not cause trouble and who made sales. While all of these activities were “related” in that they were part of the same marketing effort, they represent a series of transactions too broad to be considered related. Each transaction was different, involving different complainants in different towns approached by different sales agents who used different tactics. The Commission could credibly conclude that each of these incidents was its own “related series of violations” especially in those cases that involved more than one violation.⁵ However, we urge the Commission to focus on two separate time periods during which this fraudulent activity

⁴ The maximum monetary penalty under §1508-A(1)(A) is “\$500,000 or 5% of the annual gross revenue that the ... competitive electricity provider received from sales in the State, whichever amount is lower.” Electricity Maine’s gross annual revenue is a confidential number; it is shown in its 2018 Annual Report attached to the July 19, 2019 Procedural Order (CMS Item # 76), page 18 of 31. In order to preserve the confidentiality of this number, and to keep this brief unredacted, we do not cite this number but instead refer to the maximum penalty allowed.

⁵ We do not attempt to parse each and every violation, even for the incidents briefed.

occurred: the period before the General Counsel’s March 5, 2018 letter and its explicit warning, and the period after.

After receipt of this letter, Electricity Maine should have completely ceased the campaign and done a soup-to-nuts reevaluation and, if it did restart the effort, do so only after significant, comprehensive agent retraining and the implementation of other measures to ensure agents complied with the law. Electricity Maine failed to do this. It conducted business as usual. Thus, all violations after this letter were more troublesome and disturbing, driven by greed, inattention or both. Thus, because post March 5, 2018 violations occurred in contravention to a direct warning from the licensing authority, they’ should be seen as a series of violations separate from those that preceded this letter. Further, each violation after this letter triggers subsection 1508-A(1)(B), with its own \$500,000 penalty maximum, which also sets them apart from those that preceded the letter.⁶

With this approach in mind we now discuss the facts of the case. We divide our analysis of the violations discussed herein into these two time periods, each constituting a separate “related series of violations” and thus each with its own maximum penalty.

In its July 24, 2018 Order to Show Cause, the Commission listed the following description of the factual allegations in the Complaint Record:

January 2018-Present: The Commission and Central Maine Power Company (CMP) received numerous complaints and inquiries regarding Electricity Maine’s door-to-door marketing including:

- Electricity Maine door-to-door marketers posing as representatives of CMP and claiming that rates are about to increase or are fluctuating and offering to lower or freeze customers’ rates.

⁶ This subsection’s maximum monetary penalty is not limited by a “related series of violations” clause or any other cap.

- Electricity Maine door-to-door marketers claiming to be auditors working to correct CMP high bill problems, seeking to lower or freeze customers' rates pending the resolution of the billing investigation.
- Electricity Maine door-to-door marketers claiming to be checking customer meters to ensure being billed properly in relation to CMP high bill problems.
- Electricity Maine door-to-door marketers claiming that CMP's rates are about to increase and customers' (sic) can protect themselves by locking into a reduced rate with Electricity Maine.

The Commission and CMP asked Electricity Maine to respond to each complaint. Specifically, on January 22, 2018, Commission Staff sent correspondence to Electricity Maine seeking specific information regarding its door-to-door marketing activities and potential violations of Commission rules. In its February 9, 2018 response, Electricity Maine stated, among other matters, that it has suspended door-to-door marketing operations in Maine pending further training and that it would notify CMP before reactivating its door-to-door marketing efforts. Beginning at the end of March 2018, the Commission and CMP received several complaints regarding Electricity Maine's door-to-door marketing activities and the Commission Staff, through a letter dated May 1, 2018, requested further information from Electricity Maine. In its May 10, 2018 response, Electricity Maine indicated, among other things, that it resumed door-to-door marketing on February 28, 2018 (less than three weeks after it suspended marketing) and failed to inform CMP that it had reinstated door-to-door marketing. Subsequently, complaints have continued regarding Electricity Maine's deceptive door-to-door marketing activities.

As a general matter, Electricity Maine has not denied complaints that its sales agents acted in a misleading or deceptive manner in violation of Commission rules. Electricity Maine's response has consistently been that it would retrain or suspend offending sales agents.

Order to Show Cause at 2-3.

In its August 13, 2018 response to this Order, Electricity Maine did not deny any of these factual allegations. Rather it acknowledged the serious nature of the allegations and stated that it did not believe sanctions were warranted. *EM Response to Show Cause Order, p. 2.* Also, as the Order says, the company outlined the steps it had taken to address the situation, including "active measures" to deal with vendors "who fail to comply with EME sales

guidelines and Maine law,” retraining of sales agents, and removing offending agents from the sales force.⁷ Nowhere does Electricity Maine state that the incidents and statements detailed in the complaints were inaccurate, or that the agents were not acting under the direction and control of Electricity Maine or that they were not attempting sales on behalf of the company. Thus, these complaints are unchallenged. The company’s defense amounts to a recitation of the piecemeal actions it took after learning of the violations, and a claim that sanctions are not necessary. The Direct Testimony of Kira Jordan filed in May 2019 took a similar approach.

At hearing, as a general matter, Ms. Jordan did not refute or deny the facts summarized in the four bullets contained within the Order to Show Cause, quoted above. *Tr. 7/17/19, pp.11-13.*

Ms. Jordan was then asked about specific complaints. The Complaint Record⁸ contains a series of emails among complainants, employees of Electricity Maine, employees of Central Maine Power and employees of the Commission’s Consumer Assistance and Safety Division. Ms. Jordan was asked about four incidents from the Complaint Record. In each case, she admitted that Electricity Maine’s sales agents were involved.

Ms. Jordan was asked by Staff to identify the names of its sales agents that were associated with each complaint incident described in the Complaint Record. The confidential response to ODR-002-001 shows that with respect to thirty-two of the seventy-four

⁷ Electricity Maine did eventually cease door-to-door marketing, pending resolution of this show cause proceeding. It stated that restarting this marketing three weeks after the initial suspension in February 2018 without notifying the utility or the Commission was the result of an internal personnel situation. *Jordan Direct at 18.* It has subsequently ceased the marketing campaign pending the outcome of this proceeding. *Id. at 19.*

⁸ In this brief, we will cite to the redacted version of the Complaint Record.

complaints, including the four described at hearing and briefed below, at least one Electricity Maine agent was identified by the company.⁹ This response, combined with Ms. Jordan’s testimony in which she does not refute or deny any of the facts contained in the Complaint Record, is essentially an admission by Electricity Maine that these actions occurred and that its agents were responsible. We describe several of these complaint incidents below, along with a calculation of the maximum financial penalty for each series of violations. For reasons of confidentiality, we refer to each complaint without use of the complainant’s name or other identifying information. For each complaint incident, we also use the Bates-stamp page number in the Complaint Record, as Electricity Maine did in its response to ODR-002-001.

We now detail several of the many complaints and include a calculation of associated monetary penalties. For purposes of analysis and for calculating a maximum penalty, we have grouped these into the two time periods discussed above.

A. Complaints about events that occurred prior to the General Counsel’s March 5, 2018 warning letter.

Bath complaint; Complaint Record pp. 4-12.

Facts: On November 26, 2017 a woman in Bath sent an email to Gail Rice at CMP complaining about a man who “showed up at my door. . . representing himself as a CMP auditor” and who then asked for and looked at her CMP bill. *Complaint Record at 10-11*. He then put her on the phone with a “representative” who was evidently a third-party verification (TPV) agent for Electricity Maine because she was told that “By Enrolling in

⁹ The complaint described on pages 4-12 has six Electricity Maine agents associated with it.

Electricity Maine services we confirm . . .” At this point she wrote that she knew she had been lied to. *Id.* Unlike other complainants, this woman was not enrolled as an Electricity Maine customer.

At hearing, Ms. Jordan confirmed that the complainant had identified that the sales agent was attempting to enroll her with Electricity Maine (*Tr. 7/17/19 at 17:2-5*), and that two agents identified in the area were deactivated by Electricity Maine (*Id. at lines 15-17*). She did not refute this complaint. *Id. at 17-18*.

Violations and penalties:

1. The use of fraudulent or deceptive practices with respect to the provision of generation service is a violation of 35-A M.R.S.A. §3203(4-A), the Unfair Trade Practices Act, 5 M.R.S. ch. 10, and Commission Rule Chapter 305, §§ 3(A)(4)(d) and 4(A)(3). (*65-407 C.M.R. ch. 305*).
2. Enrolling a customer without the customer’s permission is a violation of 35-A M.R.S.A. §3203(4-A) and Commission Rule Chapter 305, § 4(A)(1) (*65-407 C.M.R. ch. 305*).
3. Because this complainant was not actually enrolled, this should be considered by the Commission as a one-day violation for purposes of §1508-A. Thus, the maximum penalty for this incident is \$5000.

Norway complaint; Complaint Record pp. 13-24.

Facts: On January 13, 2018, the Norway Police Department received a call from a man who had been approached by someone claiming to be from a company checking on CMP bills. The policeman who responded met and spoke with a Wyatt Struin, who was a

sales agent working on behalf of Electricity Maine.¹⁰ The complainant reported that he had given his account number to the agent and had then received a call from someone with a heavy accent. As with the Bath complaint, this was likely a TPV agent working for Electricity Maine. It is not apparent from the complaint whether this led to the complainant becoming enrolled for EM service.

The email from Ms. LeClerc to Ms. Clary indicating that Mr. Struin had been “immediately deactivated” serves as a direct admission of Mr. Struin’s work on behalf of the company.

Violations and penalties:

1. The use of fraudulent or deceptive practices with respect to the provision of generation service is a violation of 35-A M.R.S.A. §3203(4-A), the Unfair Trade Practices Act, 5 M.R.S. ch. 10, and Commission Rule Chapter 305, §§ 3(A)(4)(d) and 4(A)(3). (*65-407 C.M.R. ch. 305*).
2. Because this complainant was not actually enrolled, this should be considered by the Commission as a one-day violation for purposes of §1508-A. Thus, the maximum penalty for this incident is \$5000.

CASD # 2018-C-4928; Complaint Record pp. 132-159.

Facts (p. 138): Electricity Maine’s agents pretended to be CMP employees and said they could lower the complainant’s bill. He noticed that his next two bills were high, and eventually called CMP and then Electricity Maine in April, asking to be dropped because he

¹⁰ This relationship is made clear in an email from Muriel LeClerc (Electricity Maine) to Susan Clary (CMP) in which Ms. LeClerc indicates that Mr. Struin was “immediately deactivated.” *Complaint Record at 13*. See also, ODR-002-001.

had not wanted the service. Electricity Maine informed him that he had been marketed in a “door sales call.” In spite of his request to terminate service, he remained enrolled from February through at least July. The “CASD Note Data” references a violation of Commission Rule ch. 305, § 4(B)(12)(b), failure to process cancellation request within two business days. *Complaint Record at 133.*

Violations and financial penalty:

1. The use of fraudulent or deceptive practices with respect to the provision of generation service is a violation of 35-A M.R.S.A. §3203(4-A), the Unfair Trade Practices Act, 5 M.R.S. ch. 10, and Commission Rule Chapter 305, §§3(A)(4)(d) and 4(A)(3). (*65-407 C.M.R. ch. 305*).
2. Enrolling a customer without the customer’s permission is a violation of 35-A M.R.S.A. §3203(4-A) and Commission Rule Chapter 305, §4(A)(1). (*65-407 C.M.R. ch. 305*).
3. Days violation persisted: 174 (sales call on February 14, enrolled through August 7 (p. 155.))
4. Amount of fine: \$1,740,000 (ignoring cap) (174 days x 2 violations x \$5000 = \$1,740,000).
5. Failure to process customer’s cancellation request within two business days is a violation of Commission Rule ch. 305, § 4(B)(12)(b). (*65-407 C.M.R. ch. 305*).
6. Days violation persisted: 92 (May, June and July (p. 136)
7. Amount of fine: \$460,000 (ignoring cap) (92 days X \$5000 = \$460,000)
8. Total penalty (ignoring cap): \$1,740,000 + \$460,000 = \$2,200,000

For these three complaint incidents, the maximum monetary penalty for the related series of violations prior to March 5, 2018 is shown below:

Bath Complaint	5000
Norway Complaint	5000
CASD # 2018-C-4928	2,200,000
Total (ignoring cap)	2,210,000
Total (adjusted for cap)	\$500,000*

*or less depending on Electricity Maine's annual gross revenue.

B. Complaints about events that occurred after the General Counsel's March 5, 2018 warning letter.

CASD # 2018-C-2353; Complaint Record pp. 55-70.

Facts: In March 2018, an 87-year old woman was approached by a sales agent who “guaranteed her that he could provide her electric service for \$50.00 a month.” *Complaint Record at 59*. She apparently gave the agent her CMP account information because she became enrolled with Electricity Maine on March 20. *Id.* She was thus fraudulently induced by this sales agent to provide information Electricity Maine needed for enrollment.

It is unclear when she made her complaint to CASD, but there is an April 3 email from Rolanda Nadeau (CASD) to Sandra Nadeau referencing this incident. Sandra Nadeau was an employee of Electricity Maine at this time. *Tr. 7/17/19 at 24*. Given the five-day rescission period for new sign-ups and assuming Electricity Maine observed this requirement, the Commission can conclude that this person was approached by sales agent on or around March 15, which is five days prior to her first day of service. The woman was

unenrolled on March 30. *Complaint Record at 56*. Thus, these violations persisted for fifteen days.

Ms. Jordan did not refute the fact that this woman was lied to by an agent working on behalf of Electricity Maine and that this lie led to the woman becoming enrolled as an Electricity Maine customer. *Tr. 7/17/19 at 25*.

Violations and financial penalties:

1. The use of fraudulent or deceptive practices with respect to the provision of generation service is a violation of 35-A M.R.S.A. §3203(4-A), the Unfair Trade Practices Act, 5 M.R.S. ch. 10, and Commission Rule Chapter 305, §§3(A)(4)(d) and 4(A)(3). (*65-407 C.M.R. ch. 305*).
2. Enrolling a customer without the customer's permission is a violation of 35-A M.R.S.A. §3203(4-A) and Commission Rule Chapter 305, §4(A)(1). (*65-407 C.M.R. ch. 305*).
3. Given a maximum daily penalty under §1508-A(1)(A) of \$5000 per violation, and these facts show two violation (at least), the maximum penalty associated with this incident is \$150,000 (15 days x 2 violations x \$5000 = \$150,000).
4. The additional penalty for violations occurring after the explicit warning contained in General counsel's March 5, 2018 letter, §1508-A(1)(B) is \$500,000 (not subject to a cap).

CASD# 2018-C-4185; Complaint Record pp. 327-367.

Facts: In June 2018, a man submitted a complaint to the CASD in which he described deceptive activity on the part of agents of Electricity Maine. His father, a 91-year old WWII

veteran, was approached by two sales agents at his home. Though they apparently disclosed that they were from Electricity Maine, they never obtained his permission to enroll him for service. The agents were deceptive in obtaining the complainant's CMP bill ("... the two men physically took his CMP bill without his knowledge"). Thus, he found that he had become enrolled with Electricity Maine. *Complaint Record at 335*. He was enrolled from May 4, 2019 (possibly sooner) until June 14, 2019. *Complaint Record at 329, 335*.¹¹ These violations persisted for a period of forty-one days.

At hearing Ms. Jordan confirmed that the agent responsible for this practice was named Joseph Stewart and that he was no longer active. *Tr. 7/17/19 at 36-37*. She also confirmed that she did not refute the allegations surrounding this complaint. *Id.* 37-38.

Violations and financial penalties:

1. The use of fraudulent or deceptive practices with respect to the provision of generation service is a violation of 35-A M.R.S.A. §3203(4-A), the Unfair Trade Practices Act, 5 M.R.S. ch. 10, and Commission Rule Chapter 305, §§3(A)(4)(d) and 4(A)(3). (*65-407 C.M.R. ch. 305*).
2. Enrolling a customer without the customer's permission is a violation of 35-A M.R.S.A. §3203(4-A) and Commission Rule Chapter 305, §4(A)(1). (*65-407 C.M.R. ch. 305*).

¹¹ The May 4th date appears in the initial letter send to the CASD (*Complaint Record at 335*) as the first date referencing enrollment. The end date of June 14 appears in the CASC log, *Complaint Record at 329*.

3. Given a maximum daily penalty under §1508-A(1)(A) of \$5000 per violation, and these facts show two violation (at least), the maximum penalty associated with this incident is \$410,000 (41 days x 2 violation x 5000 = \$410,000).
4. The additional penalty for violations occurring after the explicit warning contained in General counsel's March 5, 2018 letter, §1508-A(1)(B) is \$500,000 (not subject to a cap).

Berwick complaint; Complaint Record pp. 32-38.

Facts (p. 33): Electricity Maine's agent pretended to be a CMP employee and induced 87-year old woman to sign a piece of paper "acknowledging he was there." She was subsequently enrolled with Electricity Maine.

Violations and financial penalty:

1. The use of fraudulent or deceptive practices with respect to the provision of generation service is a violation of 35-A M.R.S.A. §3203(4-A), the Unfair Trade Practices Act, 5 M.R.S. ch. 10, and Commission Rule Chapter 305, §§3(A)(4)(d) and 4(A)(3). (*65-407 C.M.R. ch. 305*).
2. Enrolling a customer without the customer's permission is a violation of 35-A M.R.S.A. §3203(4-A) and Commission Rule Chapter 305, §4(A)(1). (*65-407 C.M.R. ch. 305*).
3. Days violation persisted: 10 (enrolled from 3/20 to 3/30).
4. Amount of fine: \$100,000 (10 days x 2 violations x \$5000 = \$100,000).
5. Additional penalty for violations occurring after the explicit warning contained in General counsel's March 5, 2018 letter, §1508-A(1)(B): \$500,000

“Tall man” complaint; Complaint Record pp. 45-50.

Facts (p. 46): Electricity Maine’s agent, described the complainant as a “tall man,” pretended to be a CMP employee and induced a woman to sign up and she was subsequently enrolled. She only noticed that she had been enrolled when calling CMP to complain about her bill.

Violations and financial penalty:

1. The use of fraudulent or deceptive practices with respect to the provision of generation service is a violation of 35-A M.R.S.A. §3203(4-A), the Unfair Trade Practices Act, 5 M.R.S. ch. 10, and Commission Rule Chapter 305, §§3(A)(4)(d) and 4(A)(3). (*65-407 C.M.R. ch. 305*).
2. Enrolling a customer without the customer’s permission is a violation of 35-A M.R.S.A. §3203(4-A) and Commission Rule Chapter 305, §4(A)(1). (*65-407 C.M.R. ch. 305*).
3. Days violation persisted: 33 (enrolled from 4/20 to 5/23 (pp. 45-46.))
4. Amount of fine: \$330,000 (33 days x 2 violations x \$5000 = \$330,000)
5. Additional penalty for violations occurring after the explicit warning contained in General counsel’s March 5, 2018 letter, §1508-A(1)(B): \$500,000

CASD # 2018-C-4445; Complaint Record pp. 94-115

Facts (p. 98): Electricity Maine’s agent pretended to be a CMP employee and evidently induced complainant to give information necessary for enrollment. Complainant found out upon receipt of subsequent CMP bill that she had been enrolled.

Violations and financial penalty:

1. The use of fraudulent or deceptive practices with respect to the provision of generation service is a violation of 35-A M.R.S.A. §3203(4-A), the Unfair Trade Practices Act, 5 M.R.S. ch. 10, and Commission Rule Chapter 305, §§3(A)(4)(d) and 4(A)(3). (*65-407 C.M.R. ch. 305*).
2. Enrolling a customer without the customer's permission is a violation of 35-A M.R.S.A. §3203(4-A) and Commission Rule Chapter 305, §4(A)(1). (*65-407 C.M.R. ch. 305*).
3. Days violation persisted: 32 (enrolled from 5/12 to 6/13 (p. 112.))
4. Amount of fine: \$320,000 (32 days x 2 violations x \$5000 = \$320,000)
5. Additional penalty for violations occurring after the explicit warning contained in General counsel's March 5, 2018 letter, §1508-A(1)(B): \$500,000
CASD # 2018-C-3387; Complaint Record pp. 313-322.

Facts (p. 317) Electricity Maine agent advised a woman that if she signed up, her electrical usage would be reduced by 30%. She agreed and was surprised to see that her first bill was higher (the supply rate was 10.49¢/kWh).

Violations and financial penalty:

1. The use of fraudulent or deceptive practices with respect to the provision of generation service is a violation of 35-A M.R.S.A. §3203(4-A), the Unfair Trade Practices Act, 5 M.R.S. ch. 10, and Commission Rule Chapter 305, §§3(A)(4)(d) and 4(A)(3). (*65-407 C.M.R. ch. 305*).

2. Enrolling a customer without the customer's permission is a violation of 35-A M.R.S.A. §3203(4-A) and Commission Rule Chapter 305, §4(A)(1). (*65-407 C.M.R. ch. 305*).
3. Days violation persisted: 30 (she was enrolled for at least 30 days as she received a monthly bill (p. 317.))
4. Amount of fine: \$300,000 (30 days x 2 violations x \$5000 = \$300,000)
5. Additional penalty for violations occurring after the explicit warning contained in General counsel's March 5, 2018 letter, §1508-A(1)(B): \$500,000
CASD # 2018-C-5258; Complaint Record pp. 375-450.

Facts (p. 428, 430) Electricity Maine agent advised a woman that if she signed up, her electricity bill would be lower. When she saw this was not the case after being enrolled she complained to CASD.

Violations and financial penalty:

1. The use of fraudulent or deceptive practices with respect to the provision of generation service is a violation of 35-A M.R.S.A. §3203(4-A), the Unfair Trade Practices Act, 5 M.R.S. ch. 10, and Commission Rule Chapter 305, §§3(A)(4)(d) and 4(A)(3). (*65-407 C.M.R. ch. 305*).
2. Enrolling a customer without the customer's permission is a violation of 35-A M.R.S.A. §3203(4-A) and Commission Rule Chapter 305, §4(A)(1). (*65-407 C.M.R. ch. 305*).
3. Days violation persisted: 69 (she was enrolled on 5/11 and service was terminated on 7/19 (p. 428.)).

4. Amount of fine: \$690,000 (ignoring cap) (69 days x 2 violations x \$5000 = \$690,000).
5. Additional penalty for violations occurring after explicit warning contained in General counsel's March 5, 2018 letter, §1508-A(1)(B): \$500,000

CASD # 2018-C-5386; Complaint Record pp. 502-524.

Facts (p.504-505, 507) Electricity Maine agent advised woman that if she signed up she would have free service for a year and then be charged 11¢/kWh thereafter. Within a few days she called to cancel. As of August, Electricity Maine still had not cancelled her service.

Service was eventually terminated on August 10, 2018.

Violations and financial penalty:

1. The use of fraudulent or deceptive practices with respect to the provision of generation service is a violation of 35-A M.R.S.A. §3203(4-A), the Unfair Trade Practices Act, 5 M.R.S. ch. 10, and Commission Rule Chapter 305, §§3(A)(4)(d) and 4(A)(3). (*65-407 C.M.R. ch. 305*).
2. Enrolling a customer without the customer's permission is a violation of 35-A M.R.S.A. §3203(4-A) and Commission Rule Chapter 305, §4(A)(1). (*65-407 C.M.R. ch. 305*).
3. Days violation persisted: 112 (she was solicited on 4/20 and service was terminated on 8/10 (p. 507.)).
4. Amount of fine: \$1,120,000 (ignoring cap) (112 days x 2 violations x \$5000 = \$1,120,000).

5. Additional penalty for violations occurring after the explicit warning contained in General counsel's March 5, 2018 letter, §1508-A(1)(B): \$500,000.

For these complaint incidents, the maximum monetary penalty for the related series of violations following March 5, 2018 is shown below:

Incident	§1508-A(1)(A) violation	§1508-A(1)(B) violation
CASD # 2018-C-2353	150,000	500,000
CASD # 2018-C-4185	410,000	500,000
Berwick complaint	100,000	500,000
"Tall man" complaint	330,000	500,000
CASD # 2018-C-4445	320,000	500,000
CASD # 2018-C-3387	300,000	500,000
CASD # 2018-C-5258	690,000	500,000
CASD # 2018-C-5386	1,120,000	500,000
Total (ignoring cap)	3,420,000	
Total (adjusted for cap)	500,000	
Sub total	500,000*	4,000,000
Total		\$4,500,000*

*or less depending on Electricity Maine's annual gross revenue.

The following table shows the OPA's requested total monetary penalty.

Total for period prior to March 5, 2018	500,000
Total for period after March 5, 2018	4,500,000
Total requested monetary penalty	\$5,000,000*

*or less depending on Electricity Maine's annual gross revenue.

We acknowledge that this is a very large penalty. We have nevertheless demonstrated herein that a maximum penalty is fully supported by the evidence. We note that due to the limitations of the OPA's time and resources, the complaints that form the basis for the monetary penalty discussed herein are only a subset of the complaints in the record. We further note, with regard to the complaints we addressed, that there are other violations we

did not describe, such as failure to provide Terms of Service, or failure to unenroll the customer within the time period required. In other words, the maximum penalty could be much higher than \$5 million. Recognizing, however, that \$5 million is a very large penalty for a CEP, we suggest that a smaller amount would be acceptable and would still provide meaningful enforcement deterrence. We strongly suggest that a monetary penalty be no less than \$1 million.

Finally, should the Commission agree with us, any penalty collected from Electricity Maine should be used for an campaign to educate consumers about retail choice. *35-A M.R.S. § 117(3)(B)(5)*. This would serve the purpose of helping more customers understand that utilities do not supply power, that the standard offer is the result of a competitive bid process designed to help consumers and that CEPs compete against the standard offer as well as each other. Thus, the funds could be used to help the retail market mature.

VI. Conclusion

We urge the Commission to find that Electricity Maine repeatedly and willfully violated many of Maine's retail electricity consumer protection laws and rules. The nature of many of the sales agents' violations is egregious, showing a callous disregard for the law and for the customer. Electricity Maine's failure to provide meaningful and effective training before and during the marketing campaign, and its lax oversight of agents during the campaign, as well as its poor response to repeated communications from CMP, the CASD and Commission Staff concerning the many complaints, shows the CEP to be unworthy of continuing to hold a valid license. We therefore urge the Commission to suspend Electricity Maine's license for

a minimum of one year. We recommend that the Commission levy a monetary penalty pursuant to §1508-A of at least \$1 million.

Respectfully submitted,



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Senior Counsel



Andrew Landry
Deputy Public Advocate